Tan Sri Dato' Sri Ramasamy a/l Muthusamy v Alliance Bank Malaysia Bhd & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24–6–01 OF 2020
TEE GEOK HOCK JC
10 SEPTEMBER 2020

Land Law — Assignment — Property absolutely assigned to financier — Buyer of property from developer assigned property absolutely to bank in return for loan to finance purchase — Deed of assignment prohibited buyer from dealing with property in any way without bank's consent and gave bank right and power to sell the property as absolute owner thereof if he failed to repay loan — Whether any secret deal buyer subsequently entered into with developer or any other party with respect to the property could not defeat bank's rights and interests in the property — Whether both buyer and developer merely held the property as bare trustees/constructive trustees and had no power to create any new proprietary or equitable interests in the property which defeated those held by the bank

The plaintiff was the director in a property development company ('IRDK') which had signed a sale and purchase agreement to sell a five-storey shop cum office ('the property') to a buyer ('Uthama') for RM4.3m. Uthama obtained a RM2.5m loan from the first defendant ('Alliance') to part-finance the purchase. In consideration for the loan, Uthama executed a deed of assignment absolutely assigning the property to Alliance. The deed, inter alia, precluded Uthama from dealing with the property in any manner without Alliance's prior consent and also provided that if he defaulted in repaying the loan, Alliance had the right and power to sell and assign the property as the absolute unencumbered owner thereof by way of public auction or private treaty. In return for receiving the loan sum from Alliance, the developer undertook to forward the duly executed memorandum of transfer and title for the property to Alliance. Without Alliance's knowledge, the developer and Uthama later entered into a deal which threatened to affect Alliance's rights and interests in the property, in that, in return for obtaining an interest-free loan from the developer for his company, Uthama executed an irrevocable power of attorney ('PA') giving the developer the absolute right to sell the property if the loan was not repaid within six months and to use the sale proceeds to recoup its loan and to redeem the property from Allliance. When Uthama defaulted under its loan agreement with Alliance, the latter put the property up for sale by way of public auction. The second defendant ('D2') successfully bid for the property at RM3.7m. D2 filed proceedings in court to remove a private caveat entered by the plaintiff on the property and also to compel the developer to honour its undertaking to Alliance to execute and forward the memorandum of transfer

and the strata title to the property. In response, the plaintiff filed the instant originating summons ('OS') praying for: (a) a declaration that the proclamation of sale of the property was null and void and that the defendants were barred from dealing in any manner with the property in view of his private caveat; and (b) alternatively, Alliance pay the plaintiff RM3.5m in damages being the plaintiff's loss of pecuniary interest in the property. Alliance submitted that the plaintiff had no locus standi to maintain the OS because, inter alia, Uthama's PA was given to the developer and not to the plaintiff personally.

Held, dismissing the OS:

(1) The plaintiff had no locus standi to file and maintain the OS in his personal capacity because the PA executed by Uthama was in favour of the developer company and not to the plaintiff personally. On this ground alone, the OS had to be dismissed (see paras 17–18).

(2) Alliance was the absolute beneficial owner of the property. Having received the full purchase for it, the developer was a bare trustee holding the property on trust for the benefit of Uthama or his assignee or successor-in-title. And since Uthama had, for valid consideration, absolutely assigned the property to Alliance, he was also a constructive trustee holding the property on trust for Alliance. Any subsequent attempt by both the developer and Uthama to create any proprietary right to or interest in the property in favour of any other person without Alliance's prior consent could not defeat Alliance's rights and interests under the absolute assignment. At all material times, the developer had prior knowledge of the deed of assignment between Alliance and Uthama. The PA between Uthama and the developer could not defeat Alliance's rights and interests in the property (see para 21).

(3) Neither the developer nor the plaintiff had any caveatable interest in the property. In the first place, the plaintiff never claimed that he had any personal caveatable interest in the property but that he was only lodging the caveat on behalf of the developer landowner. On its part, the developer, too, had no caveatable interest because upon receiving the full purchase price for the property, it merely held the property as a bare trustee for Uthama. On his part, Uthama was a bare trustee/constructive trustee of the property for Alliance and he had no right or power to sell or deal with the property or convey any right or interest therein to any other person without Alliance's consent. Hence, the PA Uthama created in favour of the developer was null and void vis a vis Alliance and the bank's assignees or successors-in-title. Since the PA could not validly create or confer any right or interest in the property in favour of the developer, the latter had no caveatable interest (see paras 42–43).

(4) Both the auction under the loan agreement and deed of assignment and the proclamation of sale were valid in law. The plaintiff had not proven on balance of probabilities that either he or the developer had suffered any real loss as a result of Alliance's auction sale (see paras 64 & 72).

[Bahasa Malaysia summary

Plaintif adalah pengarah di sebuah syarikat pemaju hartanah ('IRDK') yang telah menandatangani perjanjian jual beli untuk menjual sebuah kedai pejabat lima tingkat ('hartanah tersebut') dengan pembeli ('Uthama') dengan harga RM4.3 juta. Uthama memperoleh pinjaman RM2.5 juta dari defendan pertama ('Alliance') untuk membiayai sebahagian pembelian tersebut. Sebagai balasan bagi pinjaman tersebut, Uthama telah menandatangani surat ikatan penyerahan hak sementara menyerahkan hartanah tersebut kepada Alliance. Surat ikatan tersebut, antara lain, melarang Uthama berurusan dengan hartanah tersebut dengan apa cara apa sekalipun tanpa sebarang persetujuan terlebih dahulu dari Alliance dan juga sekiranya ianya gagal membayar balik pinjaman, Alliance mempunyai hak dan kuasa untuk menjual dan menyerahkan hartanah tersebut sebagai pemilik mutlak tanpa sebarang bebanan melalui lelongan awam atau perjanjian peribadi. Sebagai balasan menerima jumlah pinjaman dari Alliance, pemaju berakujanji untuk menyerahkan memorandum pindah milik dan suratan hak milik yang telah ditandatangani kepada Alliance. Tanpa pengetahuan Alliance, pemaju dan Uthama kemudian membuat perjanjian yang akan menjejaskan hak dan kepentingan Alliance terhadap hartanah tersebut, kerana, sebagai balasan untuk mendapatkan pinjaman tanpa faedah dari pemaju bagi syarikatnya, Uthama telah menandatangani surat wakil kuasa tidak boleh batal ('PA') memberikan hak mutlak kepada pemaju untuk menjual hartanah tersebut sekiranya pinjaman tidak dijelaskan dalam tempoh enam bulan dan menggunakan hasil penjualan untuk mendapatkan kembali pinjamannya dan menebus hartanah tersebut dari Allliance. Apabila Uthama ingkar di bawah perjanjian pinjaman dengan Alliance, ia telah meletakkan hartanah tersebut untuk dijual melalui lelongan awam. Defendan kedua ('D2') berjaya membida hartanah tersebut pada harga RM3.7 juta. D2 memfailkan prosiding di mahkamah untuk membatalkan kaveat persendirian yang dimasukkan oleh plaintif ke atas hartanah tersebut dan juga untuk memaksa pemaju untuk menghormati akujanji ia dengan Alliance bagi menandatangani dan menyerahkan memorandum pindah milik dan suratan hak milik strata terhadap hartanah tersebut. Sebagai balasan, plaintif memfailkan saman pemula semasa ('SP') memohon untuk: (a) deklarasi bahawa pengisytiharan penjualan hartanah tersebut adalah tidak sah dan terbatal dan bahawa defendan dilarang berurusan dengan hartanah tesebut dengan cara apa pun berdasarkan kaveat persendiriannya; dan (b) secara alternatif, Alliance membayar ganti rugi kepada plaintif sebanyak RM3.5 juta kerana kehilangan kepentingan kewangan terhadap hartanah tersebut. Alliance mengemukakan bahawa plaintif tidak mempunyai locus standi untuk memfailkan SP kerana,

A antara lain, PA Uthama diberikan kepada pemaju dan bukan kepada plaintif secara peribadi.

Diputuskan, menolak SP:

B (1) Plaintif tidak mempunyai locus standi untuk memfailkan dan mengekalkan SP dalam kapasiti peribadinya kerana PA yang ditandatangani oleh Uthama adalah bagi syarikat pemaju dan bukan kepada plaintif secara peribadi. Atas alasan ini, SP harus ditolak (lihat perenggan 17–18).

C (2) Alliance adalah pemilik hartanah tersebut secara benefisial. Setelah menerima pembelian penuh untuknya, pemaju adalah pemegang amanah hartanah tersebut untuk kepentingan Uthama atau pemegang haknya atau pengganti hak miliknya. Dan oleh kerana Uthama, untuk balasan yang sah, telah menyerahkan hartanah tersebut kepada Alliance D secara mutlak, beliau juga adalah pemegang amanah konstruktif yang memegang hartanah tersebut untuk Alliance. Sebarang percubaan lanjutan oleh pemaju dan Uthama untuk melaksanakan hak pemilikan atau kepentingan harta tanah tersebut kepada pihak lain tanpa persetujuan Alliance terlebih dahulu tidak akan dapat membatalkan hak E dan kepentingan Alliance berdasarkan penyerahan hak secara mutlak. Pada masa yang material, pemaju mempunyai pengetahuan mengenai surat ikatan penyerahan hak sementara antara Alliance dan Uthama. PA antara Uthama dan pemaju tidak dapat membatalkan hak dan kepentingan Alliance terhadap hartanah tersebut (lihat perenggan 21).

F (3) Baik pemaju mahupun plaintif tidak mempunyai kepentingan kaveat terhadap hartanah tersebut. Pertama kali, plaintif tidak pernah mendakwa bahawa beliau mempunyai kepentingan kaveat persendirian terhadap hartanah tersebut tetapi beliau hanya mengemukakan kaveat G bagi pihak pemilik tanah pemaju. Di pihaknya, pemaju, juga tidak mempunyai kepentingan kaveat kerana setelah menerima harga pembelian penuh untuk hartanah tersebut, ia hanya memegang hartanah tersebut sebagai pemegang amanah bagi Uthama. Di pihaknya, Uthama adalah pemegang amanah/pemegang amanah konstruktif hartanah H tersebut untuk Alliance dan ia tidak mempunyai hak atau kuasa untuk menjual atau menguruskan hartanah tersebut atau menyerahkan hak atau kepentingannya kepada pihak lain tanpa persetujuan Alliance. Oleh itu, PA Uthama yang dilaksanakan untuk pemaju adalah terbatal dan tidak sah berdasarkan Alliance dan penerima hak atau pengganti bank. I Oleh kerana PA tidak dapat melaksanakan atau menyerahkan hak atau kepentingan hartanah tersebut kepada pemaju, ianya tidak mempunyai kaveat (lihat perenggan 42–43).

(4) Kedua-dua lelongan berdasarkan perjanjian pinjaman dan surat ikatan penyerahan hak sementara dan pengisytiharan penjualan adalah sah.

Plaintif tidak membuktikan berdasarkan kepada imbangan kebarangkalian bahawa beliau atau pemaju telah mengalami kerugian akibat lelongan oleh Alliance (lihat perenggan 64 & 72).]

Cases referred to

Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor [2014] 3 MLJ 672, CA (refd)
Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480, SC (refd)
Damai Freight (M) Sdn Bhd v Affin Bank Bhd [2015] 4 MLJ 149; [2015] 4 CLJ 1, FC (refd)
Danaharta Managers Sdn Bhd v Khee Cheong Mesinjahit & Letrik Sdn Bhd [2008] 8 MLJ 28, HC (refd)
Harris v DPP [1952] 1 All ER 1050D (refd)
Hassan bin Kadir & Ors v Mohamed Moidu bin Mohamed & Anor [2018] Supp MLJ 266, FC (refd)
He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662, FC (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank [1989] 2 MLJ 149, SC (refd)
Mahadevan & Anor v Patel [1975] 2 MLJ 207, FC (distd)
Mutual Life' & Citizens' Assurance Company Ltd & Another v Give Raleigh Evatt [1971] AC 793, PC (refd)
Ng Kheng Yow v Chiah Ah Foo & Ors [1987] 2 MLJ 330, FC (refd)
Perak Integrated Network Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1, FC (refd)
Quinn v Leatham [1901] AC 506 (refd)
Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd) [2020] MLJU 228, FC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169, FC (refd)
Yee Weng Kai v Yam Kong Seng & Anor [2013] 2 MLJ 575, CA (folld)
Yeo Ping Tieng & Ors v Elitprop Sdn Bhd [2020] 3 MLJ 269; [2020] 1 CLJ 276, FC (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614; [1994] 3 CLJ 20, SC (refd)

Legislation referred to

National Land Code ss 5, 206(1), (3), 207, 259(3), 265(4), 281(3), 322, 322(2), (3), First Schedule, Forms 14A, 16A, 16F, 16I

Jarrett Ong (Shafee & Co) for the plaintiff.
Denise Teoh (Shook Lin & Bok) for the first defendant.

JJ Naidu (JJ Naidu dan Rakan-Rakan) for the second defendant.

Tee Geok Hock JC:

INTRODUCTION AND BACKGROUND

[1] In substance, the main issue in this case is whether a developer can validly enter into a subsequent side-deal with a purchaser who had absolutely assigned all the purchaser's rights to and interest in the shophouse in favour of the end-financing bank who thereby disbursed the loan money to the developer as payment of the balance purchase price and through such subsequent side-deal, restrict or prohibit the bank-assignee from selling the shophouse by auction in the event of the purchaser-borrower's default in the loan repayment.

[2] The second issue in this case is whether a director of the developer can, by relying on the said side-deal and in the absence of any power of attorney by the developer to appoint him as its attorney, in the director's own name sue the bank-assignee to stop the bank-assignee from selling the shophouse by auction.

[3] The plaintiff was, and still is, a director of IRDK Land Sdn Bhd.

[4] IRDK Land Sdn Bhd was the developer of a commercial project at Alam Avenue including the shophouse ('the property') which forms the subject-matter of this suit: para 4 of the plaintiff's affidavit-in-support.

[5] The first defendant is the end-financing bank who gave a loan to the purchaser one Uthama Kumara a/l Sundra Rajoo ('Uthama') to finance the payment of balance purchase price for the property.

[6] The second defendant is the successful bidder in a LACA auction sale of the property conducted by the first defendant-bank after Uthama defaulted on the loan repayment.

[7] In the present suit, the plaintiff sues the defendants for:

(a) a declaration that the proclamation of sale dated 27 April 2019 in respect of a loan agreement cum assignment ('LACA') auction of a five storey shop office with life (end unit) under HS(M) 4531, PT 773, Padang Jawa, Bukit Raja in the district of Petaling, Selangor with an address at No A1-2, Jalan Serai Wangi F16F, Section 16, 40200, Shah Alam, Selangor, Darul Ehsan ('the property') is null, void and of no effect;

(b) a declaration that the defendants are restricted from any form of dealings over the property by virtue of the private caveat lodged bearing presentation No 2697/2016;

(c) alternatively to prayers 1 and 2 that the first defendant be liable for damages of RM3.5m being the plaintiffs loss of pecuniary interest over the property;

(d) costs to be borne by the defendants; and

(e) that such further and other orders of directions be made or given as this honourable court deems just and expedient in the circumstances.

FACTS OF THE CASE

[8] By sale and purchase agreement dated 29 July 2010, IRDK Land Sdn Bhd ('the developer') agreed to sell and Uthama agreed to purchase the property at a purchase price of RM4,288,888.88: see exh 'TSR1' to the plaintiffs affidavit-in-support.

[9] Uthama obtained a loan from the first defendant to part-finance the purchase of the said property. The full purchase price (inclusive of the loan money disbursed by the first defendant) was received by the developer: para 5 of plaintiff's affidavit-in-support and para 8 of the first defendant's affidavit-in-reply.

[10] In consideration of the loan, Uthama executed a deed of assignment dated 30 September 2010 ('the deed of assignment') in favour of the first defendant-bank; para 9 of the first defendant's affidavit-in-reply.

[11] The deed of assignment contains, inter alia, the following terms:

(i) cl 2.1

> Pursuant to the FACILITY AGREEMENT and in consideration of the BANK having agreed to grant and make available and/or continue to grant ... to the ASSIGNOR the FACILITY, the ASSIGNOR as beneficial owner of the PROPERTY hereby assigns absolutely to the BANK the full and entire rights title and interest of the ASSIGNOR in and to the PROPERTY and under the PRINCIPAL SALE AGREEEMNT together with the ASSIGNOR'S rights of enforcement thereof or thereunder as security for the payment ... of the SECURED AMOUNTS ...

(ii) cl 2.6

> ... the ASSIGNOR shall not during the subsistence of this Assignment without consent in writing of the BANK first had obtained, execute any form of assignment, charge, mortgage, debenture ... pledge, lien or any encumbrance or lodge any caveat ... in respect of PROPERTY'

(iii) cl 5.1.3

> 5.1 On the occurrence of an EVENT OF DEFAULT, the BANK shall

A immediately be entitled ... to exercise all or any of the following rights and powers:

5.1.3 the right and power to sell and assign the PROPERTY as the absolute unencumbered owner thereof by way of public auction or private treaty ...

B (see para 9 of the first defendant's affidavit-in-reply).

[12] By letter of undertaking dated 6 September 2010 (exh 'TN15' to the second defendant's affidavit-in-reply) executed by the developer in favour of the first defendant bank, the developer undertook to the first defendant-bank C in the following terms:

MESSRS ALLIANCE BANK MALAYSIA BERHAD

15-0 THE BOULEVARD OFFICES

MID VALEY CITY, LINGKARAN SYED PUTRA

D 59200 KUALA LUMPUR

RE: PROJECT : ALAM AVENUE

PROPERTY : UNIT NO. A1-2, FIVE (5) STOREY SHOP OFFICE

E *MASTER TITLE : GM 49, LOT NO. 786 & GM 50, LOT NO. 787, MUKIM BUKIT RAJA, DISTRICT PETALING, SELANGOR DARUL EHSAN.*

PURCHASER(S)/ :

BORROWER(S) : UTHAMA KUMARA NAIDU A/L SUNDARA RAJOO

DEVELOPER : IRDK LAND SENDIRIAN BERHAD

F *END-FINANCIER : ALLIANCE BANK MALAYSIA BERHAD*

PURCHASE PRICE : RM4,2888,888.88

LOAN AMOUNT : RM2,500,000.00

LETTER OF UNDERTAKING

G We refer to your Solicitor's letter dated 3/9/10 and confirm our undertaking with you as follows:-

IN CONSIDERATION of your agreeing to release to use the loan amount of RM2,500,000.00 granted by you to the Purchaser(s) Borrower(s) in accordance with the certified completed stages of works as listed in the Schedule of Payment H contained in the Sale & Purchase Agreement dated 29/7/10 entered into between ourselves and the Purchaser(s) prior to the Issuance of the separate documents of title/strata title to the property and registration of the transfer in favour of the Purchaser(s)/Assignor(s) and subsequently charged in favour AND PROVIDED THAT all terms and conditions of the Sale and Purchase Agreement shall have fully I complied with by the Purchaser(s) and the Purchaser(s) shall have executed the Memorandum of Transfer and you remain the Assignee(s) of the Property, WE HEREBY UNDERTAKE 70:-

1) Upon issuance of the separate document of title/strata title to the Property we will execute a valid but unstamped Memorandum of Transfer in favour

of the Purchaser(s)/Assignor(s) or in your favour as Attorney of the Assignor(s) as the case may be and cause the same to be delivered to your Solicitor or to you together with the separate documents of title/strata title to the Property free from all encumbrances, quit rent and such other relevant documents as may be necessary to effect the registration of the Transfer and charge;

2) refund to you on demand all sum released to us pursuant to and under the said loan in exchange for all relevant documents previously delivered to you intact, in the event that:

(a) the said Memorandum of Transfer is not or cannot be registered by the land authorities for any reason whatsoever and as a result the charges created in your favour cannot be or is not registered; or

(b) the Certified of Fitness for occupation is respect of the property cannot be issued by the relevant authorities; or

(c) the construction of the building in which the property is comprised is suspended or abandoned for any reason; or

3) (a) not to subject the Master Title to further encumbrances of charges without your prior consent (which consent shall not be unreasonably withheld); and

(b) In the event the Master Title shall be encumbered or charged to any Bank or Financial Institution, we shall obtain from the said Bank or Financial Institution a letter of disclaimer disclaiming their interest and rights over the property and any foreclosure proceedings taken under their charge against us.

[13] Unbeknown to the first defendant-bank, the developer and Uthama subsequently entered into a side-deal which appears to include the following arrangements:

(a) by letter dated 18 June 2012, the developer at Uthama's request gave a friendly loan of RM150,000 to Uthama's company Inlook International (M) Sdn Bhd and the friendly loan is supposed to be secured by the property: para 2 of plaintiff's statutory declaration dated 10 October 2015 in exh 'TN17' to the second defendant's affidavit-in-reply;

(b) Uthama's authorisation letter dated 1 May 2013 purporting 'to authorize IRDK Developer on behalf to sell the Alam Avenue 16 at Shah Alam (Unit No A1-1 and A1-2) buildings for minimum 8 million RM as I am based in United Kingdom' exh 'TSR2' to plaintiffs affidavit-in-support;

(c) irrevocable power of attorney, said to be dated 9 July 2013 but stamped on 14 August 2019, purporting to appoint the developer as the attorney and donee, containing terms including the following:

A

1. the Donor shall vest the legal rights, title, interest and benefit of the said Properties to the Donee for a consideration of a sum of RM3,500,000.00 subject to the terms of the Power of the Attorney therein contained.

B

2. 2. In consideration to the said properties shall be subject to an interest free friendly loan paid in part payments and or either in full settlement to the Donee.

The consideration shall be refunded and or repaid within the period of six (6) months from the date of this Power of Attorney.

C

3. In the event, Donor does not settle the interest free friendly loan to the Donee within the period of six (6) months, the Donee shall have the absolute option/right to sell the said properties with the legal rights, title, interest and benefit to the said properties.

D

4. In the event if the said properties are put on sale after the period of six (6) months, the Donor and the Donee hereby agrees that the interest free friendly loan shall be paid to the Donee from the purchase price of the sale of the properties and the balance of the proceeds of the sale shall be paid to the bank to redeem the said properties from the financing banks of the said properties and less all other cost including legal fees and only thereafter the balance to be paid to Donor.

E

5. In the event the Donor intends to sell the said properties to any purchaser, the Donor shall notify the Donee of the sale and purchase and the Donee shall consent to. the sale to enable to the Donor to settle the interest free loan out of the purchase price notwithstanding the six (6) months time periods agreed upon by the Donor and the Donee herein contained.

F

6. In the event the Donor shall fail, refuse and neglect to settle the interest free friendly loan with the period of six (6) months, the Donor shall let go all rights, title, interest and benefits on the said properties subject to the terms of the power of Attorney herein contained. The Donor must get the consent from the Donee at any point of the time to executed any agreement pertaining to these said properties, therefore, any agreement executed without the consent by the Donor is deemed to be null and void. (see 'Exhibit 'TSR-3' to Plaintiff's Affidavit-in-Support):

G

(4) On or about 20.11.2015, the plaintiff in his personal capacity lodged a private caveat on the title to the Property:

H

Exhibit 'TSR-4' to Plaintiff's Affidavit-in-Support;

I

(d) although a friendly loan of RM3.5m was supposed to be given by the developer to Uthama as envisaged by the said second power of attorney, the developer did not give any loan money to Uthama. What the plaintiff alleged is that an amount of RM150,000 was given by the

developer to Uthama's company Inlook International (M) Sdn Bhd, but no documentary proof of such payment of RM150,000 has been produced;

(e) Uthama defaulted on loan repayment to the first defendant bank;

(f) on 1 August 2018, Uthama was adjudicated as a bankrupt in a petition filed by CIMB Bank Bhd: exh 'TN18' to the second defendant's affidavit-in-reply;

(g) in exercise of its powers under the facility agreement deed of assignment and power of attorney dated 30 September 2010, the first defendant-bank by proclamation of sale carried out a public auction of the property on 27 April 2019, and the second defendant was the successful bidder at the price of RM3,720,00: exh 'TSR7' to plaintiff's affidavit-in-support;

(h) the second defendant requested the developer to honour the developer's letter of undertaking by executing memorandum of transfer and delivery of the issue-document of title: para 5(a) of the second defendant's affidavit-in-reply;

(i) as the developer refused to accede to the second defendant's demand, the second defendant filed Shah Alam High Court Originating Summons No BA-24NCvC-1603–11 of 2019 ('Suit 1603') to enforce the developer's letter of undertaking: para 5(a) of the second defendant's affidavit-in-reply;

(j) the second defendant also filed Shah Alam High Court Originating Summons No BA-24NCvC-1604–11 of 2019 ('Suit 1604') to remove the caveat filed by the plaintiff on the property: para 5(b) of the second defendant's affidavit-in-reply; and

(k) on or about 23 January 2020, the plaintiff filed this suit to pray for the following orders and ancillary orders:

(i) a declaration that the proclamation of sale dated 27 April 2019 in respect of a loan agreement cum assignment (LACA) auction of a five storey shop office with life (end unit) under HS (M) 4531, PT 773, Padang Jawa, Bukit Raja in the District of Petaling, Selangor with an address at No A1–2, Jalan Serai Wangi F16/F, Section 16, 40200, Shah Alam, Selangor, Darul Ehsan ('the property') is null, void and of no effect;

(ii) a declaration that the defendants are restricted from any form of dealings over the said over the property by virtue of the private caveat lodged bearing presentation No 2697/2016; and

(iii) alternatively to prayers 1 and 2 that the first defendant be liable for

damages of RM3.5m being the plaintiffs loss of pecuniary interest over the property.

LOCUS STANDI

[14] The first defendant has submitted that the plaintiff does not have the locus standi to maintain this suit because the purported second power of attorney was given by Uthama in favour of the developer, and not to the plaintiff in his personal capacity.

[15] It is trite law that a company and its officers (including directors) as well as the shareholders are separate legal entities.

[16] In our present case, neither the plaintiff nor the defendants have alleged or contended that the corporate veil of the developer should be lifted.

[17] In *Perak Integrated Network Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1 at p 15, the Federal Court held that:

> [42] The proper plaintiff rule is founded on the fundamental principle that a company is a legal entity separate and distinct from its members. Where a cause of action is vested in the company, it is the company alone that can sue (per Lord Millet in the Hong Kong Court of Final Appeal in *Waddington Ltd v Chan Chun Hoo & Ors* [2009] 4 HKC 381 at para [47]). Lord Denning MR explained the rationale for the rule succinctly in *Wallersteiner v Moir (No 2)*; *Moir v Wallersteiner and others (No 2)* [1975] QB 373 at p 390:
>
> > It is fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* (1843) 2 Hare 461.

[18] The fundamental principle that a company is a legal entity separate and distinct from its members is also applied by the Court of Appeal in *Yee Weng Kai v Yam Kong Seng & Anor* [2013] 2 MLJ 575 at p 585 and *Bumiputra-Commerce Bank Bhd v Augusto Pompeo Romei & Anor* [2014] 3 MLJ 672 at p 682.

[19] As the impugned second power of attorney, upon which this suit was based, was made in favour of the Developer IRDK Land Sdn Bhd, the plaintiff as a director of the developer has no legal capacity or locus standi to file and maintain this suit in the plaintiff's own personal capacity.

[20] On this ground alone, the originating summons herein should be dismissed with costs.

ABSOLUTE ASSIGNMENT IN FAVOUR OF FIRST THE DEFENDANT-BANK

[21] As the developer vendor has received the full purchase price for the property, the developer was and still is a bare trustee holding the property in trust for the benefit of the purchaser or the purchaser's assignee or successor-in-title, as the case may be: *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20 (SC); *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662 (FC).

[22] Where the purchaser, who has fully paid the purchase price to the developer/vendor, absolutely assigns the purchaser's rights to and interest in the property to an assignee, the assignee becomes the beneficial owner of the property, and the purchaser becomes the constructive trustee holding the property for the assignee. Any subsequent attempt by the developer/vendor or the purchaser/assignor to create any proprietary right to or interest in the property without the prior consent of the assignee will not defeat the rights and interest of the assignee under the absolute assignment: see Federal Court's decision in *Sabah Development Bank Berhad v Petron Oil (M) Sdn Bhd (formerly known as Exxonmobil Borneo Sdn Bhd)* [2020] MLJU 228 (FC).

[23] A vendor who is a bare trustee has no beneficial interest in the property and is not authorised by law to sell or deal with property. The prior absolute assignee's proprietary rights cannot be defeated by the registered title of a bona fide immediate purchaser for value: *He-Con Sdn Bhd*, para [61], following an earlier Federal Court decision in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1.

[24] In our present case, the plaintiff does not dispute that the assignment by Uthama in favour of the first defendant-bank is an absolute assignment. The words 'absolutely assigns' in the deed of assignment in our present case are indicative of absolute assignment and not by way of charge only: see Federal Court's decisions in para [71] in *Sabah Development Bank Bhd v Petron Oil (M) Sdn Bhd* and in *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149; [2015] 4 CLJ 1, and *Hipparion (M) Sdn Bhd v Chung Khiaw Bank* [1989] 2 MLJ 149.

[25] The developer/vendor in our present case had knowledge of the execution of the deed of assignment between Uthama as the assignor and the first defendant-bank as the assignee. This is evident from the developer's letter

of undertaking dated 6 September 2010 which expressly mentions 'Purchaser/Assigner' and 'you remain the Assignee of the property'. In the circumstances, the developer/vendor is bound by the absolute assignment.

[26] In the premises, even if one were to assume that Uthama's purported second power of attorney to the developer/vendor was executed bona fide, the developer/vendor cannot acquire any right to or interest in the property which can possibly defeat or prevail over the first defendant-bank's rights and interest as the absolute assignee.

[27] In this connection, it is pertinent to note that even if the developer/vendor were to purportedly exercise its alleged powers under Uthama's second power of attorney and transfer the property to another buyer who became the registered proprietor such other buyer's registered title is still liable to be set aside in accordance with the legal principles decided by the Federal Court in *Yeo Ping Tieng & Ors v Elitprop Sdn Bhd* [2020] 3 MLJ 269; [2020] 1 CLJ 276 (FC). In *Yeo Ping Tieng* case, the developer sold the land to the first plaintiff, who obtained bank facilities from the third plaintiff-bank via loan agreement cum assignment to the bank. The developer undertook to the bank to release the separate title to the bank once the separate title was issued. Subsequently, the developer re-sold the land to the third defendant and made the third defendant as registered proprietor. The plaintiffs sued for recovery of the land. On appeal, the Federal Court set aside the third defendant's title and held that the third defendant was privy to the fraud or cheating. While delivering the judgment in the case of *Yeo Ping Tieng & Ors v Elitprop Sdn Bhd* [2020] 3 MLJ 269 Azahar Mohamed FCJ now CJ (Malaya) held as follows:

> [53] In *Mercantile Bank Ltd v The Official Assignee of the Property of How Han The* [1969] 2 MLJ 196, Raja Azlan Shah J (as his Highness then was) said, '... independent of our land legislation, our courts have always recognised equitable and contractual interests in land'. Further the rules of equity recognise the creation of the beneficial interest in land under the NLC. The Federal Court in *Hassan Kadir & Ors v Mohamed Moidu Mohamed & Anor* [2011] MLJU 1556; [2011] 5 CLJ 136 explained it as follows:
>
> > It is trite that the modified form of the Torren System of registration of titles relating to alienated land as applied under the Code does not prevent the creation of beneficial interest in land whether under 'express trust', 'constructive trust' or 'resulting trust' arising out of the operation of law. This is derived from the rules of equity which is applicable in this country by virtue of section 3 of the Civil Law Act 1956. And as was said by Syed Agil Barakbah SCJ in *Lian Keow Sdn Bhd (in Liquidation) & Anor v Overseas Credit Finance (M) Bhd & Ors* [1988] 1 LNS 44.
>
> The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust ... Prior to the registration of the

title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as constructive trustee.

[28] On the ground of absolute assignment by itself, the plaintiff's suit herein should be dismissed with costs.

THE IMPUGNED SECOND POWER OF ATTORNEY AND THE PLAINTIFF'S CAVEAT

[29] Clause 2.6 of the deed of assignment reads as follows:

the ASSIGNOR shall not during the subsistence of this Assignment without the consent in writing of the BANK first had and obtained, execute any form or assignment, charge, mortgage, debenture ... pledge, lien or any encumbrance or lodge any caveat ... in respect of the PROPERTY.

[30] Even in the absence of such express cl 2.6 of the deed of assignment, the legal effect of an absolute assignment is that Uthama became a bare trustee or constructive trustee holding the property for the benefit of the first defendant-bank, and Uthama has no power or capacity to create any proprietary right or interest in the property in favour of any other person: see case authorities cited in paras 21, 22, 23 and 27 above.

[31] It is an undisputed fact that neither the developer nor Uthama has ever notified the first defendant-bank of the second power of attorney or has ever obtained any consent from the bank for the creation of the second power of attorney.

[32] In *Danaharta Managers Sdn Bhd v Khee Cheong Mesinjahit & Letrik Sdn Bhd* [2008] 8 MLJ 28 at p 37, the High Court held as follows:

Though the LACDA (loan agreement cum deed of assignment) provides for consent, the plaintiff did not obtain the said consent from the third defendant [the assignee] before proceeding to create the 25 June 1997 debenture ... The first defendant could not now pass the title or interest in the said property to the plaintiff as the said property was now encumbered with the interest of the third defendant at the material time. In short, there was no interest or title that the first defendant could pass around without the consent of the third defendant.

[33] Based on the principles decided in the case authorities cited in paras 21, 22, 23, 27 and 32 above, I hold that the second power of attorney cannot purport to diminish or prejudice the rights and interest of the first defendant-bank as the absolute assignee in connection with the property.

[34] In the present case, the plaintiff also contends that he had the locus standi to lodge a private caveat on the property and that by virtue of his private caveat, the purported auction sale of the property by the first defendant-bank to the second defendant was null and void.

[35] In arguing that the plaintiff, as the director of the developer, has a caveatable interest based on the purported second power of attorney issued by Uthama in favour of the developer, the plaintiff relied on a dictum of Suffian LP in the old case of *Mahadevan & Anor v Patel* [1975] 2 MLJ 207. In analysing Suffian LP's judgment in *Mahadevan v Patel*, it is pertinent to be mindful of the guidance of the English Law Lords that all judgments in the common law systems are to be read in the factual context of the cases in question and not in the abstract. 'Every judgment of the Court must be read as governed by the facts of the case': *Quinn v Leatham* [1901] AC 506. Every case is decided on its own facts and must be read accordingly: per Viscount Simon in *Harris v DPP* [1952] 1 All ER 1050D. 'All judgment under the common law system must be *understood secundum subjectectum materiam:* judges, in pronouncing principles, have in mind the characteristics present in the case, which characteristics may be absent in other cases': per Lord Diplock in *Mutual Life' & Citizens' Assurance Company Ltd & Another v Give Raleigh Evatt* [1971] AC 793 at p 802D–F.

[36] The facts in *Mahadevan v Patel* were as follows:

> One Ratnavale had some business dealings with respondent, who is the managing director of the company. On March 21, 1967, the company paid Ratnavale through his solicitors Messrs Ong Huck Lim & Co $250,000. This is evidenced by the receipt at p 56 the appeal record which reads:
>
> ONG HUCK LIM & CO,
>
> ADVOCATES & SOLICITORS,
>
> Beach Street,
>
> Penang.
>
> CLIENTS NO. 10816
>
> Penang, March 21, 1967
>
> Re : Charge of Grant No. 715 for Lot No. 461 and Grant No. 1171 for Lot 290, Mukim of Kulim.
>
> Received from M/s. Manilal & Sons (M) Ltd., the sum of Dollars Two Hundred and fifty thousand only for above. $250,000
>
> Cashier
>
> Six-cent stamp.

It is to be noted that that receipt clearly states that the money was received from the

company rather than from the respondent personally, and secondly it referred to 'a charge of the two lands.

Somehow or other the lands were never charged to the company or the respondent.

On October 10, 1972, the company's solicitor wrote the letter at p 37 of the appeal record to Ratnavale's solicitor pointing out that the latter had received on the company's behalf $250,000 'for effecting a certain transaction with Mr M Ratnavale' and asking for the return of that money within a week as the transaction had not come through.

But on November 2, 1972, the respondent's solicitor wrote a letter to Ratnavale and his wife referring to a meeting at which both of them admitted having taken the $250,000 from the respondent rather than from the company. This letter (at p 34) also referred to an arrangement between the Ratnavales and the respondent whereby the Ratnavales were to buy Bukit Merah Estate which consisted of five separate pieces of land, the respondent was to have $250,000 worth of share in the venture (hence presumably the payment of the $250,000) and this share was to be secured by a charge over the five lots constituting the Estate. The letter also referred to an agreement by the Ratnavales that they would transfer to the respondent some portions of the Estate to the value of $250,000 less whatever had been repaid. Finally the letter gave warning that the respondent's solicitors might enter a caveat against, the lands.

On November 6, 1972, the respondent applied to caveat the land. In his application (p 20 of appeal record) he did not mention the company. He said that he was the beneficial owner of four pieces of lands, including the two in question, as their registered proprietor Ratnavale had agreed to transfer them to him as repayment of $250,000 lent by him to Ratnavale.

Eventually the respondent withdrew the caveat against two pieces, leaving in being the caveat against the two pieces in question only, and it is with this caveat alone that we are concerned.

It will be noted that there is no reference in this application to the fact if true that the $250,000 had been paid to Ratnavale by the company.

Ratnavale died on April 9, 1973, and his two brothers are now executors and trustees of his estate, applicants in the court below and appellants before us.

On July 18, 1974, the appellants applied to the court for an order that caveat entered by the respondent be removed from the register. This application was heard on November 9 and on December 7, 1974, it was rejected by the learned judge.

Mr Sivalingam argues the learned judge should have held that the'Claim of the respondent was merely for the return of the money alleged to have been lent and that the respondent had no registrable interest that could be protected by a caveat.

With respect I do not think there is any merit in this appeal. The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests. It is not for us at this stage to say whether or not the respondent or whether or not the company has a good claim at law against the appellants, but it seems clear that there is evidence which if believed at the trial of

A the substantive issue would establish that the respondent who was managing director of the company was acting throughout on behalf of the company in regard to the money paid to Ratnavale, and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person claiming title to, or any registrable interest in, any alienated B land or even claiming only a right to such title or registrable interest, who may enter a caveat, in my judgment it was proper for the respondent to enter the caveat, and right for the learned judge to refuse to remove it, so that it may remain on the register until the disposal of the suit pending between the company and the appellants.

C The receipts, if believed, will show that the money lent to Ratnavale was lent by the company and that it was the intention of the parties at the time that the loan should be secured by a charge over the lands concerned. To the argument that in that case the company alone has a caveatable interest, I agree with the argument on behalf of the respondent that, as the respondent was acting in his capacity as managing D director of the company, both the respondent and the company have a caveatable interest in the lands.

[37] When the court's judgment in *Mahadevan v Patel* is read in its factual context, the principle which I can glean from *Mahadevan v Patel* is that where E the evidence shows an arguable case that either the company or its managing director has paid a valuable consideration to the proprietor for purchase a proprietary right to the land and the managing director has lodged a private caveat claiming that he had beneficial interest in the land without mentioning the company, then there is an arguable case of the managing director having a F caveatable interest and the court will not remove the caveat before the full trial of the question as to whether it was the company or its managing director who has caveatable interest on ground of having made a contract with the proprietor.

G

[38] In our present case, the facts are materially different from those of *Mahadevan v Patel* case. In our present case:

(a) the plaintiff does not claim to have any beneficial interest in the property personally; H

(b) in the Borang 19B caveat application form, the plaintiff stated he was a director of the 'landowner', the developer, and the developer has authorised him to lodge caveat; and

I (c) in the statutory declaration accompanying Borang 19B, the plaintiff stated that the developer (tuan punya Tanah) gave a friendly loan of RM100,000 to Uthama's company and the friendly loan was to be secured against the land (see exh 'TSR4' to the plaintiff's affidavit-in-support).

[39] As such, *Mahadevan v Patel* case can be distinguished from the present case on the facts.

[40] In my considered view, the judgment in the unique facts in *Mahadevan v Patel* cannot be interpreted to override the fundamental principle of the company law that a company and its directors are distinct and separate entities and the fundamental of contract law on the doctrine of privity of contract. There are a plethora of recent decided authorities which restated and confirmed these fundamental principles, and I do not see the necessity to repeat them here.

[41] In the premises, I reject the plaintiff's contention that plaintiff in his own name has any locus standi or legal capacity to lodge any private caveat on the property to which the company claims an alleged proprietary right.

[42] Even if one were to assume that the director can personally lodge a private caveat on a land to which the company claims an alleged proprietary interest, there is also no caveat interest for which either the developer of the plaintiff could validly lodge a private caveat. As I have held in Part 4 above, the developer was a bare trustee for Uthama upon the receipt of the full purchase price, and upon the signing of the first power of attorney and the deed of assignment, Uthama in turn became a bare trustee or constructive trustee holding the proprietary rights and interest in trust for the benefit of the first defendant bank. As a bare trustee or constructive trustee, Uthama had no right or power to sell or deal with the property or to create any proprietary right or interest in the property to another person without the prior written consent of the first defendant bank. The second power of attorney was therefore null and void vis a vis the first defendant bank and the bank's assignee or successors-in-title. As Uthama had no power or right to create or confer any proprietary right or interest in the property to another person, neither the developer nor the plaintiff could lawfully obtain any title to or interest in the property from Uthama. In the circumstances, the impugned second power of attorney did not validly create or confer any legal right to or interest in the property in favour of the developer. Neither could it create or confer any caveatable interest in the property upon the plaintiff or any other person.

[43] In the premises, I hold that neither the developer nor the plaintiff has any caveatable interest in the property.

[44] In this connection, it is pertinent to note that as from 6 September 2010 (the date of the developer having notice of the assignment in favour of the first defendant-assignee), the developer became a bare trustee holding the proprietary interest in the property in trust for the benefit of the first defendant-assignee.

[45] It is trite that the duties of a trustee include, among others, the duty to protect and preserve the trust property and the duty not to make personal benefit out of the trust property.

[46] If this court were to sustain the plaintiffs arguments in the present case, it would be tantamount to nullifying the trustee's duties under the law and condoning the trustee's side-deal with another person to gain a personal benefit or an advantage for the trustee to the prejudice of the beneficiary. That is something which the court of law and equity will not do.

[47] In the premises, I conclude and hold that a developer cannot validly enter into a subsequent side — deal with a purchaser who had absolutely assigned all the purchaser's rights to and interest in the shophouse in favour of the end-financing bank who thereby disbursed the loan money to the developer as payment of the balance purchase price and through such subsequent side-deal, restrict or prohibit the bank-assignee from selling the shophouse by auction in the event of the purchaser-borrower's default in the loan repayment.

[48] In our present case, the plaintiff also contends that with the subsistence of his private caveat on the property, the first defendant-bank could not lawfully carry out any auction sale of the property.

[49] In the paras above, I have come to the conclusion that neither the developer nor the plaintiff has any caveatable interest in the property.

[50] Even if one were to assume that the plaintiff or the developer had a caveatable interest, that would still not assist the plaintiff in the present case.

[51] In *Ng Kheng Yow v Chiah Ah Foo & Ors* [1987] 2 ML J 330 at p 331 the Supreme Court held that the fourth respondent who had become a beneficial owner over the land first in time (by executing the sale and purchase agreement and the paying the full purchase price), had a better equity vis a vis the appellant (who lodged a caveat over the land earlier, but after the fourth respondent had become a beneficial owner). In that case the Supreme Court found that the appellant (the caveator) had nothing to caveat, in view that the vendor had previously sold its interest in the property to the fourth respondent (who is the beneficial owner, first in time). In the subsequent case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 at p 28 the Federal Court referred to and applied the principle decided in the case of *Ng Kheng Yo* by holding as follows:

> [75] In *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330, the Supreme Court held that even though the respondent (in that case) failed to lodge a caveat, it did not deprive him in having a better equity against the appellant (in that case)

who had lodged a caveat; *the reason being that the appellant had nothing to caveat as the vendors had already sold all his interest to the respondent there*. (Emphasis added.) The Supreme Court in *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 at p 483 also cited the case of *Ng Kheng Yow* with approval.

[52] It is trite law that the entry of the private caveat does not create any right or interest in the property, as can be seen from the following decided authorities:

(a) Supreme Court, *Ng Kheng Yow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330 at p 331:

> On the facts of this case *the entry of a private caveat by one party does not necessarily mean that he has better priority against another who has not as yet lodged one.*
>
> ...
>
> ... the mortgages to the plaintiffs and the mortgage of the first two defendants are thus all of them equitable mortgages only, and the question I have to decide is whether the plaintiffs or these two defendants have the better equity. (Emphasis added.)

(b) Federal Court, *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 at p 28, where the court held:

> [73] It must be emphasised here that in law, a caveat does not create any rights or interests ... a caveat is merely a warning which creates no new rights ...
>
> [74] ... a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor ...

(c) Federal Court, *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169 at p 170; and

(d) Supreme Court, *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 at p 483.

[53] As the entry of the caveat does not create any right or interest in the property, the first defendant's deed of assignment takes priority over the plaintiff's purported caveat. This is the legal position based on the following case authorities:

(a) Supreme Court, *Ng Kheng Yow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330 at p 331, where the Supreme Court held that the fourth respondent who had become a beneficial owner over the land first in time (by executing the sale and purchase agreement and the paying the full purchase price), had a better equity vis a vis the appellant (who lodged a caveat over the land earlier, but after the fourth respondent had become a beneficial

owner). The Supreme Court found that the appellant (the caveator) had nothing to caveat, in view that the vendor had previously sold its interest in the property to the fourth respondent (who is the beneficial owner, first in time);

(b) Federal Court, *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 at p 28, where the Federal Court had referred to and applied the case of *Ng Kheng Yow*:

> [75] In *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330, the Supreme Court held that even though the respondent (in that case) failed to lodge a caveat, it did not deprive him in having a better equity against the appellant (in that case) who had lodged a caveat; *the reason being that the appellant had nothing to caveat as the vendors had already sold all his interest to the respondent there*. (Emphasis added.)

THE BANK'S RIGHT TO SELL BY AUCTION

[54] The plaintiff argues that the bank has no right to sell the property by public auction in view of s 322 of the National Land Code, and that in any event such public auction could not be carried out during the subsistence of a private caveat.

[55] Section 322(3) of the National Land Code ('the NLC') provides as follows:

> (3) The effect of any private caveat expressed to bind a particular interest only shall, subject to sub-sections (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of —
>
> (a) any instrument of dealing directly affecting that interest including any certificate of sale relating thereto); and
>
> (b) where that interest is a lease or sub-lease —
>
> (i) any claim to the benefit of any tenancy exempt from registration granted directly thereout, and
>
> (ii) any lien-holder's caveat in respect thereof.

[56] The following sections of the NLC deal with issuance of a certificate of sale:

(a) s 5 of the NLC:

> 'certificate of sale' means any certificate issued to a purchaser under sub-section (3) of section 259 or subsection (4) of section 265, including either of those subsections as applied by sub-section (3) of section 281;

(b) s 259(3) of the NLC — governs the sale of a property through a *court*

auction, whereby a certificate of sale is issued to the purchaser in *Form 16F*;

(c) s 265(4) of the NLC — governs the sale of a property through a *land enquiry*, whereby a certificate of sale is issued to the purchaser in *Form 16I*;

(d) s 281(3) of the NLC — governs the sale of a property by *enforcing a lien*, whereby a certificate of sale is issued to the purchaser in *Form 16F*.

[57] Section 207 of the NLC provides that every instrument effecting any dealing under the NLC shall be in the forms specified in the First Schedule of the NLC. Such forms for the instrument of dealings includes Form 14A (memorandum of transfer) and the Form 16A (charge), *but does not include a contract of sale pursuant to an assignment*.

[58] Section 5 of the NLC defines 'certificate of sale' means any certificate issued to a purchaser under sub-s (3) of s 259 or sub-s (4) of s 265, including either of those sub-sections as applied by sub-s (3) of s 281.

[59] The aforesaid provisions of NLC make it clear that a contractual sale under a loan agreement (LACA) is not a certificate of sale within the definitions of the NLC.

[60] In fact, and as submitted in para 29 of the plaintiff's submissions, s 206(3) of the NLC provides that nothing in s 206(1) of the NLC shall affect the contractual operation of any transaction relating to any interest over alienated land (ie such as an exercise of a power of sale under a deed of assignment).

[61] The Federal Court in *Damai Freight (M) Sdn Bhd v Affin Bank Bhd* [2015] 4 MLJ 149 at pp 163–165 held:

> [41] *Section 206(3) of the NLC*, by providing a liberal application of equity, recognizes the contractual operation of any transaction relating to alienated land or any interest therein. *In this regard, we see no reason as to why a similar recognition could not be accorded to the bank in exercising its power of sale over the land in accordance with the contractual provisions under the LACA* ... we are of the view that the bank is therefore entitled to exercise its power of sale under the LACA and to transfer the chose in action under the principal agreement to the purchaser by way of a further assignment.
>
> [45](f) *Section 206(3) of the NLC allows such a transaction relating to any alienated land to give effect to the contractual obligations and rights of the parties as they had determined under the LACA*. (Emphasis added.)

In fact, in *Hassan bin Kadir & Ors v Mohamed Moidu bin Mohamed & Anor* [2018] Supp MLJ 266, the Federal Court held that a *deed of sale* is not an 'instrument of dealing' within the provisions of the National Land Code. Similarly here, the *proclamation of sale* is not an 'instrument of dealing' nor a 'certificate of sale' under the NLC, as submitted in paras 29–31 of the first defendant's written submissions dated 25 June 2020, and in paras 4–13 of the first defendant's submissions in reply dated 7 July 2020. The relevant part of the Federal Court's judgment in *Hassan bin Kadir* case is reproduced below:

> [18] ... Premised on the above, I am of the view that the *deed of sale in the present case does not fall within the meaning of the word 'dealing' as defined in s 5 of the Code, And it is not 'an instrument of dealing' within the provision of s 205 of the Code read together with ss 206–211 thereof.* I would, therefore, answer the first part of the question in the negative. Since our answer to the first part of the question is in the negative, then it necessarily follows that the prohibition in s 205(3) of the Code does not apply to the deed of sale. That is our answer to the second part of the question. (Emphasis added.)

[62] In the premises, a contract of sale under a loan agreement cum assignment or under a deed of assignment is not prohibited by s 322(2) of the NLC.

[63] It follows therefore that the first defendant-bank is allowed by law to execute the proclamation of sale arising from the LACA auction pursuant to a loan agreement cum assignment or a deed of assignment.

[64] In the circumstances, this court holds that both the LACA auction and the proclamation of sale are valid.

[65] The subsistence of a private caveat does not affect the validity of the LACA auction sale or the proclamation of sale. What the private caveat does is that as long as the private caveat has not been withdrawn or removed, the private caveat restrains the registration of the successful bidder as the registered proprietor, though in the meantime the successful bidder becomes the beneficial owner of the property upon his full payment of the bid price. After the LACA auction, it was then for the successful bidder to take steps to apply for removal of the private caveat if he wishes to be registered as the registered proprietor.

ALTERNATIVE CLAIM OF RM3.5m

[66] In prayer 3 of the plaintiffs originating summons, the plaintiff claims in the alternative that the first defendant-bank should pay RM3.5m as alleged pecuniary loss of the plaintiff on the property.

[67] As discussed and concluded above, the friendly loan of RM150,000 was allegedly paid by the developer to Inlook International (M) Sdn Bhd, Uthama's company, and any purported right or interest under the impugned second power of attorney was allegedly conferred upon the developer. Under the fundamental principle of separate entity between a company and its directors and under the doctrine of privity of contract, the plaintiff has no locus standi or legal competence to claim for any alleged right or any alleged loss arising from such right. Moreover, the first defendant-bank is not privy to the side-deal with the developer purportedly made with Uthama behind the bank's back.

[68] Secondly, the proprietary rights to and interest in the property have been absolutely assigned by Uthama to the first defendant-bank with the developer's knowledge, and the purported second power of attorney was null and ineffective vis a vis the first defendant-bank. As such, there is no valid basis on merits for either the developer or the plaintiff to claim against the first defendant-bank for any alleged loss.

[69] In the third place, the amount of friendly loan allegedly given by the developer to Uthama was only RM150,000 instead of the RM3.5m which the developer agreed to give to Uthama. If the developer were seriously minded to preserve the property from any foreclosure or auction sale, the developer should have remitted the balance friendly loan of RM3,500,000 – RM150,000 = RM3,350,000 to the first defendant-bank to redeem the property on behalf of Uthama. The plaintiff has not offered any explanation why this logical step was not taken at all. With the developer's failure to provide the balance friendly loan (which it impliedly promised vide the side-deal with Uthama) or to pay Uthama the agreed consideration of RM3.5m for the issuance of the impugned power of attorney (which it promised or agreed under Item 1 of the impugned second power of attorney) there is no basis for the developer or the plaintiff to claim for RM3.5m from the first defendant-bank whatsoever.

[70] Fourthly, Uthama's authorisation letter dated 1 May 2013 relied upon by the plaintiff was purportedly 'to authorise IRDK Developer on behalf to sell the Alam Avenue Section 16 (Unit No A1-1 and A1-2) buildings for minimum 8 million RM'. Under the impugned second power of attorney including item 4 thereof the Developer was purportedly empower to sell the property on behalf of Uthama, use the sale proceeds to repay the first defendant bank for the loan and outstanding interests, repay the developer for the friendly loan given, and thereafter pay the balance to the donor (Uthama). If the developer wanted to faithfully and dutifully implement these terms, the developer would have to sell the property for at least RM8,000,000 — a virtually impossible task in the circumstances in the light of the fact that in the public auction, the highest bid was only RM3,720,200: see p 27 of exh 'TSR7' to P's affidavit-in-support. Even if one were to assume that the developer was able to sell the property for

an amount in excess of RM3,720,200, the developer's alleged entitlement on the surplus sale proceeds would be limited to RM150,000 being the actual amount of the friendly loan which the developer allegedly gave to Uthama. Any balance surplus after redemption sum for the first defendant-bank and after the developer's recoupment of RM150,000 friendly loan given would have to be paid out by the developer to Uthama (or rather Jabatan Insolvensi, with Uthama's subsisting bankruptcy status). In the circumstances, there is no basis whatsoever for the plaintiff or the developer to claim the alleged amount of RM3.5m from the first defendant-bank irrespective of the outcome on the other liability issues.

[71] In the circumstances of the present case:

(a) the plaintiff has not provide any valuation report or any evidence to show the fair market value of the property in the open market if it was sold on the basis of willing seller and willing buyer;

(b) the plaintiff has not produced any documentary evidence to prove that RM150,000 or any amount was in fact given by the developer to Uthama as a friendly loan; and

(c) the plaintiff has not produced any evidence to show that if the plaintiff were to sell the property under the purported second power of attorney, there would be any surplus sale proceeds after paying the first defendant bank for the redemption sum or outstanding bank loan.

[72] By reason of the above, I find and conclude that the plaintiff has failed to prove on a balance of probabilities that either the developer or the plaintiff has suffered any real loss as a result of the first defendant-bank's LACA auction sale.

CONCLUSION

[73] By reason of the aforesaid, I hold that a developer cannot validly enter into a subsequent side-deal with a purchaser who had absolutely assigned all the purchaser's rights to and interest in the shophouse in favour of the end-financing bank who thereby disbursed the loan money to the developer as payment of the balance purchase price and through such subsequent side-deal, restrict or prohibit the bank-assignee from selling the shophouse by auction in the event of the purchaser-borrower's default in the loan repayment.

[74] A director of the developer cannot, by relying on the said side-deal and in the absence of any power of attorney by the developer to appoint him as its attorney, in the director's own name suethe bank-assignee to stop the bank-assignee from selling the shophouse by auction.

[75] In the premises, the plaintiff in our present case has no locus standi or legal capacity to sue, in his own name, the first defendant or the second defendant here.

[76] In the present case, neither the developer nor the plaintiff could acquire any right to or interest in the property from Uthama which can possibly defeat or prevail over the first defendant-bank's rights and interest as the absolute assignee.

[77] As Uthama had no power or right to create or confer any proprietary right or interest in the property to another person, neither the developer nor the plaintiff could lawfully obtain any title to or interest in the property from Uthama. In the circumstances, the impugned second power of attorney did not validly create or confer any legal right to or interest in the property in favour of the developer. Neither could it create or confer any caveatable interest in the property upon the plaintiff or any other person without the prior consent of the bank-assignee.

[78] In our present case, neither the developer nor the plaintiff has any caveatable interest in the property. As the entry of the caveat does not create any right or interest in the property, the first defendant's deed of assignment takes priority over the plaintiff's purported caveat.

[79] In the circumstances, both the LACA auction and the proclamation of sale are valid.

[80] In any event, the plaintiff has failed to prove that he has suffered any alleged loss as a result of the first defendant-bank's LACA sale of the property.

[81] In the premises, this court has dismissed the plaintiffs originating summons with costs.

[82] After hearing counsel's views on costs, this court awarded costs of RM15,000 to the first defendant-bank and RM7,500 to the second defendant, subject to allocatur.

Originating summons dismissed.

Reported by Ashok Kumar